

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK FREEMAN,

Defendant-Appellant.

UNPUBLISHED

February 2, 2001

No. 219565

Wayne Circuit Court

LC No. 98-008338

Before: Collins, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of armed robbery, MCL 750.529; MSA 28.797, and carjacking, MCL 750.529a; MSA 28.797(a), entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant, a security guard at a shopping plaza, testified that defendant robbed him of his car, a cell phone, and cash. Complainant testified that he was familiar with defendant because defendant worked in the area. Complainant volunteered that defendant had broken into a number of businesses in the area, and that he had personally observed one such incident. Defense counsel did not object to this testimony, which the prosecution pursued briefly. Defendant testified and denied breaking into area businesses or robbing complainant. The trial court concluded that complainant's testimony was more credible, and found defendant guilty.

Defendant argues that he was denied a fair trial by the admission without notice of testimony regarding other alleged bad acts, and that trial counsel rendered ineffective assistance by failing to object to the testimony. We disagree and affirm defendant's convictions.

Evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show conformity therewith. Such evidence may be admissible to show motive, opportunity, intent, preparation, scheme, plan, or system in doing an act. MRE 404(b)(1). To be admissible under MRE 404(b)(1), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show a propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). The prosecution must give

reasonable notice that it intends to introduce other acts evidence. MRE 404(b)(2). We review a trial court's decision to admit other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

While it does not appear that the challenged evidence was offered for a proper purpose, *Starr, supra*, any error resulting from admission of the evidence was harmless. The trial court sat as the finder of fact. Unlike a jury, a judge is presumed to understand the difference between admissible and inadmissible evidence, and to consider only the evidence properly before the court. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Complainant identified defendant as the person who robbed him. The trial court was entitled to accept complainant's testimony. *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). Admission of the other acts evidence did not result in manifest injustice in light of the fact that other, properly admitted evidence provided ample support for the trial court's finding of guilt. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

The prosecution failed to give reasonable notice as required by MRE 404(b)(2) that it intended to introduce other acts evidence under MRE 404(b)(1). Because defendant did not object to the lack of notice and thus failed to preserve the issue, our review is limited to whether the unpreserved error affected defendant's substantial rights. *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). We conclude that given that other, properly admitted evidence provided overwhelming proof of defendant's guilt, the lack of notice did not affect defendant's substantial rights.

Finally, we conclude that defendant's argument that he was denied the effective assistance of counsel is without merit. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's performance resulted in prejudice. To demonstrate prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

We assume that the trial court considered only properly admitted evidence. *Wofford, supra*. That evidence proved defendant's guilt beyond a reasonable doubt. Defendant has failed to show that he was prejudiced by any deficient performance by counsel. *Toma, supra*; see also *People v Newton (After Remand)*, 179 Mich App 484, 493; 446 NW2d 487 (1989).

Affirmed.

/s/ Jeffrey G. Collins
/s/ Martin M. Doctoroff
/s/ Helene N. White